

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 3 of the)
Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Tier Buy-Through Prohibitions)
To: The Commission

MM Docket No. 92-262

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF
CONSORTIUM OF SMALL CABLE SYSTEM OPERATORS

The Consortium of Small Cable System Operators (the "Consortium"),¹ by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its Comments in response to the above-captioned Notice of Proposed Rule Making ("NPRM"), which seeks comment on the implementation of the tier buy-through prohibitions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act" or "Act").²

Section 623(b)(8) of the Act prohibits cable operators from requiring subscribers to purchase any tier of service, other than the basic tier, in order to obtain video programming that is offered on a per channel or per program basis. The Act also prohibits cable operators from discriminating between subscribers

¹ Attached hereto as Exhibit 1 is a list of the Consortium's members.

² Pub. L. 102-385, 102 Stat. (1992).

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to the basic service tier and other subscribers with respect to the rate structure offered for video programming offered on a per channel or per program basis. Cable systems that are not technically capable of complying (due to lack of addressable converter boxes or other technological limitations) are exempt from the buy-through prohibition for a period of ten years, or until technological impediments to unbundling have been eliminated. The Act expressly allows the Commission to grant waivers of the buy-through prohibition, or extend the 10 year exception by waiver, if enforcement would require a cable operator to increase its rates.³ Congress' goal in enacting the buy-through prohibition was to foster the ability of subscribers to choose freely among available programming services. The unbundling mandated by the Act is seen as providing subscribers with greater assurance that they are choosing only those program services they desire to see, and not paying for those in which they have no interest.⁴

**SMALL SYSTEM OPERATORS SHOULD BE EXEMPT FROM
THE BUY-THROUGH PROHIBITION, OR AT THE VERY
LEAST SUBJECT TO A LIBERAL WAIVER STANDARD.**

As acknowledged by the Commission, unbundling requires either addressable systems or the ability to trap signals at every subscriber's home. For small system operators, either of these options would be prohibitively expensive to implement. Consequently, the Commission should grant a permanent exemption for

³ See Sections 623(b)(8)(A), 623(b)(8)(B) and 623(b)(8)(C).

⁴ See S. Rep. No. 102-92, 102d Cong., 2d. Sess. (1992) at 77; NPRM at 2.

small systems or, at a minimum, liberally grant waivers of the tier buy-through prohibition.

The Consortium's members, like most small system operators, provide cable services primarily to less populated, more rural areas. By their very nature, such areas offer a limited profit potential due to sparse population and higher per capita cost of service. To compound their problems, small system operators are not able to take advantage of the volume discounts for equipment and program purchases typically offered to cable MSO's. In addition, because they serve areas with fewer homes per mile, small systems typically face substantially higher cable hardware and pole attachment costs. These factors combine to make financing system equipment and system upgrades much more difficult for the small system operator.

As a result of these financial and operational obstacles, the majority of the Consortium's members do not have addressable systems and do not offer multiple service tiers, as the small size and lack of density in the subscriber base, coupled with the increased per capita costs inherent in small system operations, makes tiering and the use of expensive addressable equipment economically infeasible. Thus, most of the Consortium's members would fall within the 10-year grace period provided for in the statute.⁵

⁵ The Consortium supports the FCC's conclusion (NPRM at 3) that cable systems which were not designed and built with (or upgraded to incorporate) addressable technology are by definition within the scope of the Act's 10-year exception.

Unless the demographics of the areas served by the Consortium's members change dramatically over the next 10 years (and in the majority of cases there is absolutely no reason to expect such change), the Consortium's members will be in no better position to convert to addressable systems at the end of the grace period than they are at present. Again, the small size, lack of density and higher operational costs typical of small system operations simply does not permit the huge capital expenditures associated with fully addressable systems. Unless there is an unanticipated significant influx in population (or at the very least a clustering of population) and/or a dramatic decrease in equipment prices, these economic limitations will remain 5, 10, 15 or even 20 years down the road.

In recognition of the foregoing, the FCC should exempt small system operators from the buy-through prohibition.⁶ Without an exemption, the continued expansion of cable into less populated areas will be jeopardized, and the viability of existing cable service in such areas seriously threatened. These harms far outweigh any perceived benefits associated with affording subscribers greater freedom in the choice of their programming services.

Absent an outright exemption, the Commission at the very least

⁶ The Consortium would suggest that "small cable system" be defined as an independently-owned system which has either: (a) no more than 10,000 subscribers (a 1,000 subscriber cut-off would fail to include many rural systems); or (b) annual gross revenues of \$7.5 million or less (tracking the definition employed by the Small Business Administration).

should apply a liberal waiver standard to small system operators. Whether or not a small system operator can afford to comply with the buy-through prohibition is a business decision, dependent on a range of variables specific to that operator and its system (e.g., market size, density, demographics, projected growth, expansion plans, penetration levels, age and type of existing equipment, financial resources, funding sources, etc.). It is unreasonable to expect that a test can be fashioned that could account for these myriad factors. Micromanagement at the federal level is unwarranted and unworkable, and would be counterproductive. Indeed, most small system operators could not bear the costs of a complicated administrative process to justify a waiver.

Accordingly, in the absence of an exemption, the Consortium urges the Commission to adopt a policy whereby waivers of the buy-through prohibition (or extension of the 10-year exception) will be granted upon a good faith certification by a qualified⁷ small system operator that compliance with the buy-through prohibition would impose unreasonable financial burdens on the operator such that an increase in rates likely would be required.⁸ A certification process meets the requirements of the statute, without saddling either small system operators or the FCC with unworkable or unduly burdensome waiver standards and procedures.

⁷ See note 6, supra.

⁸ An outright exemption, or a liberal waiver, should also apply to new systems planned for more rural areas, and to efforts to expand existing small system operations. Absent such relief, these areas likely will go unserved.

**THE ACT'S ANTI-DISCRIMINATION PROVISIONS
SHOULD NOT BE INTERPRETED TO UNNECESSARILY
RESTRICT AN OPERATOR'S PROGRAM PRICING AND
PACKAGING DECISIONS.**

As noted earlier, the Act prohibits cable operators from discriminating between subscribers to the basic tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.⁹ The Commission interprets this provision, when read in conjunction with the general buy-through prohibition, to mean that basic tier subscribers who do buy through are entitled to the same "rate structure" for premium or pay-per-view services as subscribers purchasing intermediate services or tiers.¹⁰

The Consortium asks that the Commission confirm that the anti-discrimination provision does not prevent operators from offering different pay packages or from pricing specific services differently based on the package requested, but only that basic-only subscribers be offered the same packages or prices offered to subscribers purchasing non-basic services. The Commission's reference to "rate structure" and a reasoned interpretation of these provisions would support this conclusion.

The same rationale applies with even greater force in the case of a la carte program offerings. All cable operators, especially small system operators given their slim to nonexistent profit

⁹ Section 623(b)(8)(A).

¹⁰ NPRM at 4.

margins, need the flexibility to price and package their program offerings in response to expressed consumer needs and interests. Any attempt to dictate these decisions from the federal level would have disastrous consequences, and is not mandated by the Act.

A true a la carte offering provides subscribers with virtually unlimited choices, enabling them to tailor their service packages as their tastes suit. The buy-through prohibition, as a mechanism for promoting program choice, is unnecessary in such an environment. Moreover, multiple channel discounts, incremental pricing, non-cumulative tiers, etc., all of which likely will be essential for practical business reasons, are consistent with the anti-discrimination provision, since this provision does not prevent operators from adopting differing pricing and packaging options, but only requires that all these options be offered to subscribers in a uniform manner.

Conclusion

Complying with the Act's buy-through prohibition will pose an insurmountable burden for most small system operators, a burden which is not likely to diminish with the passage of time due to the unique nature of the markets they serve. To ensure the continued expansion of cable into less populated areas and the viability of existing cable service in these areas, the Commission should exempt small system operators from the buy-through requirements, or at the very least, subject small system operators to a liberal waiver standard.

The Consortium also asks that the FCC confirm that the Act's

anti-discrimination language does not prevent operators from pricing and packaging program services in response to expressed consumer interests. Such flexibility is absolutely essential from a practical business standpoint.

Respectfully submitted,

**CONSORTIUM OF SMALL CABLE
SYSTEM OPERATORS**

By: 

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EXHIBIT 1

Atwood Cable Systems, Inc.

Belhaven Cable TV, Inc.

Clear Vu Cable

Fairmont Cable TV

Horizon Cable TV, Inc.

Panora Cooperative Cablevision

Pioneer Cable, Inc.

Rural Missouri Cable TV, Inc.

Southwest Missouri Cable TV, Inc.

Western Cabled Systems

CERTIFICATE OF SERVICE

I, Elizabeth Sobo, a secretary in the law office of Rini & Coran, P.C., hereby certify that I have on this 13th day of January, 1993, sent via hand delivery, a copy of the foregoing Comments to the following:

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